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IN THE

Supreme Court of the United States

October Term, 1966

No. 1125

ELIAS TSAKONITES,

Petitioner,

—against—

TRANSPACIFIC CARRIERS CORP. and HELLENIC LINES, LTD.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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ELIAS TSAKONITES,

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Elias Tsakonites, prays that a Writ of Certiorari be issued to review the decision and judgment of the United States Court of Appeals for the Second Circuit (368 F. 2d 426; opinion annexed as Appendix A and judgment as Appendix B). Same affirmed, by a divided court, a final decree entered in the United States District Court for the Southern District of New York on March 23, 1965 (246 F.S. 634; annexed as Appendix D).

Jurisdiction

The jurisdiction of this Court is invoked pursuant to the provisions of title 28 U.S.C. §1254(1), 62 Stat. 928. The judgment of the Court of Appeals affirming the judgment dismissing the complaint was entered on the 16th day of November, 1966, the appeal having been argued on the 23rd day of March, 1966.

Subsequent to the affirmance by the Court of Appeals a petition for reargument or, alternatively, for rehearing in banc, was filed and both were denied on December 28, 1966, three judges dissenting and voting for a re-hearing in banc (See Appendix C).

Questions Presented

1. Did the lower courts correctly dismiss the complaint of the plaintiff, under the Jones Act and General Maritime Law, where injury to the seaman occurred aboard a foreign flag vessel in territorial waters of the United States, and where stipulated facts showed that the sole shareholder of the Panamanian corporate owner was a Greek corporation whose stock, in turn, was 96% owned by a permanent resident of the United States and that the operations of the ship on which the injury occurred, as well as those of both corporations, were directed and controlled from the United States by such permanent resident?

2. Does the mere failure or refusal of a permanent resident alien shipowner to apply for naturalization entitle him, and the business that he is operating, to immunity from operation of the same United States law with which a competitive citizen shipowner must comply?

3. Was it a violation of petitioner's constitutional right for the District Court to withdraw from the jury the trial of the issue of fact as to whether the American law was applicable to the instant case, absent an express waiver of such right pursuant to Rule 39 of the Federal Rules of Civil Procedure?

Statute

The principal statute involved in this case is the Jones Act (41 Stat. 1007, 46 U.S.C. 688), which is set forth verbatim:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

Statement

This is an action by petitioner, and federal jurisdiction lies, pursuant to the Jones Act and the General Maritime Law of the United States, to recover damages for serious permanent injury sustained on September 26, 1959, while a crewmember (77a ¶ 1).* Petitioner was injured while the vessel was discharging cargo at a dock in Brooklyn, New York (77a ¶ 1).

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* Reference is to the Appendix certified by the Clerk of the Court of Appeals, unless otherwise stated.

Connecting Factors Warranting the Application of United States Law

The vessel was nominally owned by TRANSPACIFIC CARRIERS CORP., a Panama corporation (77a ¶ 2). The Panama corporation was, in turn, wholly owned by HELLENIC LINES LTD. (77a ¶ 2-5), incorporated in Greece (85a ¶ 34), the issued stock of which was 96½% owned by Pericles G. Callimanopoulos (78a ¶ 7), a lawful permanent resident of the United States who had been residing here since 1945 (78a ¶ 9). The vessel flew the Greek flag (86a ¶ 35).

HELLENIC LINES LTD. maintained its executive office at 39 Broadway (77a ¶ 6) in the City of New York and from there operated "22 or 23 vessels engaged in three liner services", included among which was the SS HELLENIC SPIRIT (81a ¶ 17). The said liner services were respectively engaged in service from the United States to the Mediterranean and return, to the Persian Gulf and return, and to the Red Sea, India and Burma and return (81a ¶ 17).

Not only did Callimanopoulos have absolute control of HELLENIC LINES LTD. and of the HELLENIC SPIRIT by virtue of stock control of HELLENIC LINES LTD., but as "general manager" had sole, absolute power over its affairs (84 ¶ 26, Appendix A). Callimanopoulos directed these companies from his offices at 39 Broadway, where the company had continuously maintained its offices since 1950 (79a ¶ 9). These offices had 63 employees and a monthly payroll of $28,000 (83a ¶ 22). All the agents of the various ports of the said 22 or 23 ships operated from New York reported to these executive offices at 39 Broadway (77a ¶ 6). The bulk of the companies' books and records are maintained

there (81a ¶-17). The substantial bank accounts of HELLENIC LINES are maintained at a Manhattan branch of the First National City Bank of New York and Pericles G. Callimanopoulos (84a ¶ 25), unlike any other employee, was empowered to draw, on his sole signature, the funds of the Company (84a ¶ 28), with a similar power in his wife, Anna Callimanopoulos, although she took no other active role in the business (85a ¶ 29). Extensive lines of credit were established in New York (56a-1-3).

Effectuation of this one man control by Callimanopoulos from New York was had by periodic issuance by the Board of Directors [whose appointment he controlled by virtue of his stock ownership] of Powers of Attorney, giving Callimanopoulos power anywhere, in his own sole discretion, and on his signature alone, to take any action binding the companies (84a ¶29).

The Denial of Jury Trial

This case was reached for trial on February 1, 1965 before Judge Irving Ben Cooper and a jury. Before selection of the jury, Judge Cooper called counsel for both sides into his robing room and there indicated that unless a stipulation of facts satisfactory to him were entered into between counsel, instead of proceeding with the trial, he would return the case to the Trial Part for reassignment to another trial judge, with all the attendant delay in being reached for trial at a later date. What he would do with the stipulation if made was not then disclosed by Judge Cooper, except that he expressly stated he might in any event return the case to the Trial Part.

The stipulation (77a-87a), marked Court's Exhibit 1, (and later as Exhibit 2), was entered into between counsel without agreement as to its meaning or use by the Court. Later that day counsel again appeared before the district judge as directed, who referred for the first time to a division of the case into a "first stage" (6a) and a "second stage", stating:

> "By the 'first stage', I mean the resolution of the issues of fact and law addressed to the challenge whether this Court should apply the Jones Act and the General Maritime Law of the United States to the causes of action asserted here?"

Counsel for the plaintiff immediately indicated that no waiver of a jury trial with respect to the issue was intended, the following transpiring (7a):

> "Mr. Lebovici: The categorical answer is, sir, that there is a lot but there is still more that is subject to subpoena that is not contained in the stipulation.
>
> "The Court: In other words, then, the first stage of the proceeding has not been completed?
>
> "Mr. Lebovici: There is sufficient, sir, however, if your Honor cares to consider this application—without calling that a motion for summary judgment—as to whether or not the plaintiff will make out a prima facie case. There is sufficient so that I am the person who says there is more, and I am willing to risk this issue on argument before your Honor at this time."

Thus, it was clearly the understanding of counsel for the plaintiff that the jury trial of this issue was being preserved and not waived. He expressly stated that the stipulation

did not contain all of the available facts pertinent to the issue of substantial contacts with the United States, that there was "still more subject to subpoena," and that he was willing to argue, as upon a motion for summary judgment, whether plaintiff demonstrated by the stipulated facts that there was sufficient at that point to make out a prima facie case of connecting factors to warrant application of United States law.

These statements of counsel for the plaintiff were but confirmatory of what had already been stated to the Court in the memorandum of law (10a) which had been submitted to the Court prior to our appearance for trial on February 1, 1965, the said memorandum stating, at page 2:

> "The principal problem herein is defendants' claim that the case is not adjudicable pursuant to the Jones Act and the General Maritime Law, that is, the law of the United States. The defendants insist on couching the problem in terms of 'jurisdiction'. As will be noted further on, the problem does not relate to jurisdiction at all, but solely to the problem of the sufficiency of the case presented by the plaintiff; as will be shown, jurisdiction being obviously present, the question that might be claimed to remain, is whether or not the plaintiff's evidence is sufficient to withstand a motion to dismiss the case for failure to make out a *prima facie* case at the termination of the plaintiff's case; a sufficient case appearing the case must be submitted to the jury for determination."

Also, at pages 6 and 7 of the same memorandum, counsel for the plaintiff stated:

> "The important point to be made at this juncture, is that a question of jurisdiction is not present as is

> contended by the defendants' counsel but solely a question arising at the end of the plaintiff's case as to whether or not there is sufficient evidence of contacts that are 'substantial' as requires the Court to deny a motion to dismiss for failure to make out a *prima facie* case. The courts have expressly held that it is not a matter of jurisdiction but rather whether or not a case has been made out. *Lauritzen* v. *Larsen,* 345 U.S. 571, 575; *Romero* v. *International Terminal Operation Co.,* 358 U.S. 354, 359; *Kontos* v. *The Sophie C,* 184 F. Supp. 835, 836-7; aff'd. 288 F. 2d. 437."

Again, that the defendants' attorney understood as well that the plaintiff was so contending, and that plaintiff had not in any respect waived the right to a jury trial, appears from the following statement made by such lawyer in his memorandum (p. 2 thereof) submitted to the Court on February 3, two days *after* (58a) the presentation of the stipulation requested by the trial judge:

> "The plaintiff's attorney has made the claim in the course of pre-trial proceedings *and* made the claim before the Court in the conference held in the Robing Room on February 1, that question of whether the Court has jurisdiction or the plaintiff has cause of action under the Jones Act *is one not for the Court but one for the jury."* (Emphasis ours.)

Indeed, the trial Judge's decision below nowhere touches the point directly, but makes the following oblique statement with respect to the matter (57a):

> "Trial began on February 1, 1965. The parties then agreed in open court to divide the trial into two stages, (1) a determination by the Court whether the Jones Act (46 U.S.C. §688) and the general mari-

time law (hereafter American law) are applicable, and (2) a resolution (if necessary) by the Court and jury of liability and damages.

"Accordingly, the parties stipulated to facts relating to the issue of applicable law. These, *relied upon by the plaintiff to 'make out a prima facie case'* [see Transcript of Trial Proceedings (hereafter Transcript), February 1, 1965, p. 4], or more accurately, to be the basis of the Court's determination whether American law applies, were made part of the record as Court's Exhibit 1." (Emphasis ours.)

This paraphrasing of counsel's statement to mean a possible waiver of a jury trial, was the Court's and not counsel's. Counsel's reference to argument as on a summary judgment and to a *prima facie* case both necessarily reserved the right to trial by a jury and the District Court's opinion, four weeks later, was the first indication to plaintiff that he had allegedly waived this important right. By this time, of course, it was too late for plaintiff to do anything about it in the District Court.

Reasons and Argument for Granting Certiorari

1.

The decision below is in conflict with that of the Court of Appeals for the Fourth Circuit in *Southern Cross Steamship Co.* v. *Firipis*, 285 F. 2d 651, in conflict with the decision of this Court in *Lauritzen* v. *Larsen*, 345 U.S. 571, and with the prior decision of the Second Circuit in *Bartholomew* v. *Universe Tankships Inc.*, 263 F. 2d 437.

In *Southern Cross Steamship Co.* v. *Firipis*, 285 F. 2d 651, wherein the vessel was directed and operated by an agent in New York, wherein only 20% of the stock of the

corporation owning the vessel was held by Americans and wherein the accident occurred in the United States, the Court of Appeals for the Fourth Circuit held that these factors were "substantial" and a sufficient counterweight to the law of the flag. The holding of that case is in no respect reconcilable with that of the instant case wherein not only the vessel in question but some 22 or 23 other vessels were also operated and directed from the United States, wherein the controlling stock of both the owning and operating corporations was 96% owned by a permanent resident of the United States, wherein the accident, as in *Firipis,* occurred in the United States, and wherein the contacts of the transaction with the United States were indisputably "substantial" and distinctly more important, both quantitatively and qualitatively, than they were in *Firipis.*

The very distinction made by the Court of Appeals herein enlarged the conflict between the two Circuits. Without our conceding by one iota that the *S.S. Hellenic Spirit* herein did not fly a "flag of convenience" (we urge the contrary), the Court of Appeals for the Second Circuit found:

> "The Supreme Court has given no indication that the law of the flag (when not a flag of convenience) is still not to be considered of paramount importance."

While the Supreme Court may not have so held, Judge Sobeloff, writing the *Firipis* decision for the Fourth Circuit, expressly stated (285 F. 2d 651, 645, fn. 2):

> "Moreover even in situations where the flag was not shown to be merely one of convenience other considerations have been held to justify the application of the Jones Act to ships of foreign registry."

See also: *Pavlou* v. *Ocean Traders Marine Corp.*, 211 F. Supp. 320, 324-325.

Further making review of the instant decision by the Supreme Court a matter of vital importance is the fact that while several cases have now used the term "flag of convenience" as a basis for arriving at a decision (*Firipis, supra,* at p. 653 of 285 F. 2d; *Tjonaman* v. *A/S Glittre,* 340 F. 2d 290, 291; *Tsakonitis* v. *Transpacific Carriers Corp.,* 368 F. 2d 426, 428, 429), no court has judicially defined this term, leaving an area of enormous uncertainty and dispute.

In this case the Court of Appeals has held this not to be a "flag of convenience" case similar to *Bartholomew* v. *Universe Tankships, Inc.,* 263 F. 2d 437. But no standard is supplied by which such conclusion may validly be reached. Further, those factors which are cited below as the basis for concluding this (at p. 428 of 368 F. 2d) are factors which *Lauritzen* holds insignificant.

On the contrary, moreover, it appears from *Firipis* that on similar facts the Fourth Circuit would have held this to be a flag of convenience case, but that whether it is or not, that American law should be applied.

Further conflict between the two Circuits arises with respect to the meaning to be ascribed to the decision of the Supreme Court in *Lauritzen* v. *Larsen* itself. Thus, the relative weight of the "counterweight" contemplated by *Lauritzen* as sufficient to reject the flag law is differently construed in the two Circuits. In *Firipis,* 285 F. 2d 651, 654, fn. 2, the Court of Appeals stated:

> "The Supreme Court in the Lauritzen case held that the law of the flag was the most important element,

not that it was always the controlling element, and the Court recognized that heavy contervailing considerations might override it."

In the instant case the decision below attributes to *Lauritzen* purported authority for the proposition that the law of the flag, absent a flag of convenience, is of "paramount" importance (p. 429 of 368 F. 2d). By its rejection of the substantial contacts set forth in the stipulation the Second Circuit apparently defines "paramount" as "all-prevailing", since it appears patent that the Fourth Circuit would have held the contacts *sub judice* at least as countervailing as those in *Firipis*.

The currency afforded by *Firipis* to the base of operations was nothing but a re-statement in other language of the factor of "allegiance of the shipowner" mentioned in *Lauritzen*. See also, *Pavlou* v. *Ocean Traders Marine Corp.*, 211 F. Supp. 320, 324-5. By adopting New York as its base of operations respondent in *Firipis* had established its "commercial domicile" there and thus became an allegiant of the United States (see cases cited below at point "2"). In the instant case, the court below refused to consider the commercial domicile of defendants and the allegiance due the United States by the permanent resident, Callimanopoulos.

The decision herein also conflicts with the prior decision of the Court of Appeals for the Second Circuit herein in *Bartholomew* v. *Universe Tankships Inc.*, 263 F. 2d 437. This latter decision is at odds with, as is *Firipis*, the opinion below regarding the relative weight intended to be given in *Lauritzen* to the contending factors of flag and connecting elements. *Bartholomew* interprets *Lauritzen* to

hold that in the presence of "substantial" connecting factors with the United States, the law of the flag is overbalanced. The decision herein, by ascribing "paramount" importance to the law of the flag would make virtually impossible the overbalancing of the law of the flag by appropriate connecting factors. In *Bartholomew,* at p. 440 of 263 F. 2d, the Court of Appeals cited with approval the case of *Bobolakis* v. *Compania Panamena Maritima San Gerassimo, S.A.*, 168 F. Supp. 236, stating that "American ownership alone was deemed sufficient to apply the Jones Act" and to counterweigh the law of the flag. The holding herein, where 96% stock ownership by an American resident, control and operation of the within vessel and some 22 other ships from New York, not to mention numerous other contacts of substance, also can not be reconciled either with the holding of the Second Circuit in *Bartholomew* or its approval of the holding in *Bobolakis.*

2.

The within decision determines a matter of substantial importance relating to the application of the Jones Act and General Maritime Law to an area which the Court of Appeals herein stated had not yet been conclusively established, and has failed to give proper effect to the applicable decision of this Court in *Lauritzen* v. *Larsen, supra,* and the cases cited herein relative to the obligations of resident aliens and commercial domiciliaries under our law.

While the majority below expressly stated that the elements of the case at bar have not been settled by existing decisions, the dissenting opinion unqualifiedly asked for reversal of the District Court.

The majority opinion stated:

> "The present case presents a combination of factors the significance of which is not conclusively established by existing cases." (368 F. 2d 426, 428),

while Judge Waterman's dissent held (p. 430 of 368 F. 2d):

> "So, unless the same obligations that United States law imposes on shipowners who are United States citizens are imposed on resident alien shipowners, a resident alien shipowner like Callimanopoulos will be able to enjoy the considerable benefits of lawful permanent resident alien status in this country without being subject to the duties and obligations exacted of an otherwise similarly situated competitive shipowner who is an American citizen. The statement of this last proposition would seem to be enough to require a reversal instead of an affirmance of the order below."

The many courts that have considered this area have differed with respect to the relative importance intended by *Lauritzen* to be afforded to matters of form, as opposed to matters of substance. There is no dispute that Callimanopoulos, and the two corporations through which this entire fleet was sailed, are located, operated, directed, financed and managed entirely in and from New York; that Callimanopoulos has resided here since 1945 and has been a permanent resident here since 1956 or 1957; that the accident happened here; that the plaintiff received substantial medical treatment here and was denied further treatment here that he needed; that Callimanopoulos owned 96% of the corporate stock, and that this fleet is engaged in the foreign commerce of the United States, from and return

to the United States, within the meaning of 46 U.S.C. 814, 39 Stat. 733, are all matters of substance and weight.

That Callimanopoulos has seen fit to have the two defendants herein incorporated, respectively, in Panama and in Greece, with dummy officers and directors of his own choice and whose tenure is subject to his whim whether they be Greek or otherwise; that Callimanopoulos, a lawful resident of the United States, has by his own choice failed to apply for a certificate of naturalization; that the vessel owned by an American domiciliary flew the Greek flag, and that the plaintiff herein signed a contract of adhesion with respect to his employment, are all purely matters of form.

If genuine and pervasive substance is thus to triumph over mere form, it has become necessary for this, the Supreme Court, to say so. The lower courts are in conflict with respect to the matter. That this Court was concerned with this distinction is clear from its statement in the *Lauritzen* case with respect to "Allegiance of the defendant shipowner" (345 U.S. 565, 587) wherein it stated:

> "But it is common knowledge that in recent years a practice has grown, particularly among American shipowners, to avoid stringent shipping laws by seeking foreign registration eagerly offered by some countries. Confronted with such operations, our courts on occasion have pressed beyond the formalities of more or less nominal foreign registration to enforce against American shipowners the obligations which our law places upon them. But here again the utmost liberality in disregard of formality does not support the application of American law in this case, for it appears beyond doubt that this owner

is a Dane by nationality *and domicile.*'' (Emphasis ours)

Callimanopoulos, as distinguished from J. Lauritzen, a legal resident of the United States is by such token an allegiant thereof (*Leonhard* v. *Eley,* 151 F. 2d 409, 410; *Eisler* v. *United States,* 170 F. 2d 273, 279; *The Pizzaro,* 2 Wheat (U.S.) 227, 245; *The Venus,* 8 Cranch. (12 U.S.) 253, 283; *Johnson* v. *Bales,* 6 Am. L. J. 68, 85; *Carlisle* v. *United States,* 83 U.S. 147; *The Venice,* 69 U.S. 258, 275; *The Dos Hermanos,* 15 U.S. 37, 46; *The Francis,* Fed. Cas. No. 5034 p. 674, aff'd 8 Cranch. (12 U.S.) 363; *The Indian Chief,* 3 C. Rob. 12, 18).

In holding as it did that an American shipowner would not be permitted by resort to formal artifice or nominal registration to escape the operation of United States law affected with the public interest, this Court clearly indicated that it would not permit form to subvert substance. The two corporate defendants herein both operating from and directly controlled from the United States are also commercial domiciliaries thereof, and thus are likewise allegiants of the United States (*The Indian Chief, supra; The Francis, supra; United States* v. *Chin Quong Look,* 52 Fed. 203).

It is difficult to believe that the Jones Act, the result of an ''Act to promote the welfare of American Seamen'' and an ''Act to provide for the promotion and maintenance of the American merchant marine'' (*Lauritzen,* 345 U.S. 571, 579, 580) could be so discriminately construed against the American seaman and against the American shipowner who must compete with the resident alien shipowner

'across the street'' in the identical business. Especially is this applicable if it be recalled this legislation was enacted to " . . . 'equalize the cost of operation' of American and foreign flag vessels and thereby discourage American shipowners from placing their vessels under foreign flags.'' *Monteiro* v. *Sociedad Maritima San Nicolas, S.A.*, 280 F. 2d 568, 573.

It is respectfully submitted that the confused area delineated requires and is entitled to clarification.

3.

The decision of the Court of Appeals herein, in failing to hold that the plaintiff had unconstitutionally been deprived of a jury trial with respect to an issue of fact, sanctions a departure by the lower courts from the usual and accepted course of judicial procedure so as to call for the exercise of this Court's power of supervision.

Rules 38 (a) and 39 (a) of the Federal Rules of Civil Procedure respectively provide:

38 (a) ''Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

39 (a) ''By Jury. When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action. *The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury* or (2) the court upon motion or

> of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of the United States." (Italics ours.)

As appears from *Bartholomew, supra,* at p. 441, and again at p. 443, of 263 F. 2d, whether or not the connecting factors involved are sufficient to warrant the application of United States law is itself a quesion of fact. Cf. *Lauritzen* at p. 582 of 345 U.S. Furthermore, a plaintiff is entitled in a jury action in the Federal Court to have any question of fact determined by the jury and not solely by the trial judge. Nor did the courts below deny that this is a question of fact for the jury, holding, however, that there was a purported waiver thereof.

That the facts considered below were in the main stipulated by the respective parties did not warrant the trial judge in withholding the ultimate issue of fact from the jury and in deciding it himself, since fair-minded men (for instance, the dissenting judge in the Court of Appeals) could reasonably and honestly have drawn from these same facts a conclusion that the connecting factors contained in the stipulation were indeed sufficient to warrant the application of United States law. *Fountainbleau Hotel Corp. et ano.* v. *Crossman,* 323 F. 2d 937, 943; *Gunning* v. *Cooley,* 281 U.S. 90; *Central Surety and Insurance Corp.* v. *Murphy,* 103 F. 2d 117, 119; *Lake County etc.* v. *Massachusetts Bonding & Insurance Co.,* 75 F. 2d 6, 8; *Schieman* v. *Grace Line, Inc.,* 269 F. 2d 596; *Wilson* v. *Bailey,* 257 F. 2d 352, 353.

Nor is it true that if the ultimate fact to be determined would result in deciding what body of law should be applicable, same makes the matter one for the Court, as dis-

tinguished from the jury. Thus, whether or not an employee is a seaman and the case either a Jones Act or a compensation case (*Ingram* v. *Associated Pipeline Contractors, Inc.*, 241 F. Supp. 4); or, whether or not employees are "engaged in commerce" or in "the production of goods for commerce" to warrant application of the Fair Labor Standards Act (*Lewis* v. *Times Publishing Co.*, 185 F. 2d 457; *Olearchick* v. *American Steel Foundries*, 73 S. Supp. 273); or, whether or not there has been an "overt act" under the Sherman Act so as to make that law applicable (*Bascom Launder Corp. et al.* v. *Telecoin*, 204 F. 2d 331, 335; *Moore* v. *Backus*, 78 F. 2d 571, cert. den'd 296 U.S. 640; *Hansen Packing Co.* v. *Swift & Co.*, 27 F. Supp. 364; *Farmers Co-Op Oil Co.* v. *Socony Vacuum Co.*, 43 F. Supp. 735), are all questions of fact for determination by a jury. The examples can be multiplied manifold.

Clearly herein, where counsel for both sides, stated in writing to the trial judge that each understood that petitioner's counsel was insisting that whether or not the connecting factors were sufficient to warrant the application of the Jones Act was a question of fact for the jury, petitioner's counsel had not joined in any stipulation as required by Rule 39 (a) for the waiver of a jury trial. Only by inaccurately paraphrasing the exact statement of counsel that he was agreeing to no more than the determination of whether or not the plaintiff made out a *prima facie* case in such respect, did the district court find the "oral stipulation made in open court and entered in the record, [to be] consent to trial by the court sitting without a jury," as required by Rule 39 (a). But, clearly, counsel neither had made nor intended such agreement.

Neither the stipulation of facts nor the oral stipulation of petitioner's counsel with respect to the submission to Judge Cooper provided for the express waiver required by the Rule. There cannot be such a waiver of the jury trial without an understanding that it is being waived. *Connolly* v. *United States,* 149 F. 2d 666, 669.

The matter is one of Constitutional right. *Dimick* v. *Schiedt,* 293 U.S. 474, 486.

It is respectfully submitted that the decisions below should in any event be reversed and the matter returned to the District Court for the determination of the issue by the jury.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari may issue directed to the United States Court of Appeals for the Second Circuit commanding that Court to certify and to send to this Court a full and complete transcript of the record of all proceedings of said Court in the above entitled cause, to the end that said cause may be reviewed and determined by this Court as provided by law.

And your petitioner will ever pray.

ELIAS TSAKONITES

By ISAAC SALEM
Attorney for Petitioner

HERBERT LEBOVICI
and
HAROLD D. SAFIR
On Petition

Verification

STATE OF NEW YORK
SOUTHERN DISTRICT OF NEW YORK } ss.:
COUNTY OF NEW YORK

ISAAC SALEM, being duly sworn, deposes and says:

That he is one of the attorneys for the Petitioner, Elias Tsakonites, that he has read the said Petition subscribed by him and that the facts therein stated are true to the best of his knowledge, information and belief.

/s/ ISAAC SALEM
Isaac Salem

Sworn to before me this
7th day of March, 1967

MILTON C. WINKLER
Notary Public, State of New York
No. 31-9704765
Qualified in New York County
Commission Expires March 30, 1968